Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-65

REPUBLICAN PARTY OF SHELBY COUNTY, TENNESSEE,
Appellant,

v.

ROSCOE DIXON, WILLIAM OWENS, CLYM CROSS, LILA CROSS, PATRICIA MAY WEATHER, and RONALD K. HOOKS, Individually on Behalf of Themselves and All Other Resident Citizens and Qualified Electors of the State of Tennessee, and SHIRLEY HASSLER, Coordinator of Elections, ANN WELDON, JACK H. MORRIS, III, LEAH V. ABBOTT, PAT JOYNER, and WILLIAM AUSTIN, Shelby County Election Commissioners; and THE COMMITTEE FOR THE PRESERVATION OF THE SEVENTH CONGRESSIONAL DISTRICT,
Appellees.

On Direct Appeal from the United States Three-Judge District Court for the Western District of Tennessee, Western Division

MOTION OF THE COORDINATOR OF ELECTIONS AND SHELBY COUNTY ELECTION COMMISSIONERS TO DISMISS, OR AFFIRM

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OPINION BELOW

The opinion of the United States Three-Judge District Court for the Western District of Tennessee, Western Division was entered on March 25, 1976 (J.S. App., A-1—A-36) and is not yet reported.

JURISDICTION

The opinion of the United States Three-Judge District Court for the Western District of Tennessee, Western Division was entered on March 25, 1976. An order in accordance with the United States District Court's opinion was entered on April 5, 1976. (J.S. App., A-35—A-36). Notice of appeal was filed in the United States District Court, Western District of Tennessee, Western Division, on April 30, 1976. (J.S. App., A-37). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Having determined that Tennessee's congressional districting statute was unconstitutional, was the District Court, as a matter of law in fashioning a remedy in 1976, confined to the 1970 decennial census population figures?

2. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 in judicial enactment of a new congressional redistricting statute?

3. Should official United States Census Bureau estimates of population of congressional districts in mid-decade be considered by the District Court in 1976 to show that a malapportionment that may have existed in 1970 has corrected itself as a result of population shifts?

STATUTE INVOLVED

Tennessee Code Annotated (T.C.A.), § 2-1603, as amended in 1972, establishes Tennessee's eight (8) congressional districts.

The validity of subsections 6, 7, and 8, which establish the sixth, seventh, and eighth congressional districts respectively were at issue in the District Court. T.C.A. § 2-1603 provides in pertinent part as follows:

> "The State of Tennessee is divided into the following eight (8) congressional districts:
>
> * * * * * * *
>
> "(6) The sixth congressional district is composed of the counties of Chester, Decatur, Dickson, Fayette, Giles, Hardeman, Hardin, Henderson, Hickman, Houston, Humphreys, Lawrence, Lewis, McNairy, Maury, Montgomery, Perry, Wayne, Williamson and the following voting wards, precincts and districts of the city of Memphis and Shelby County: 56-2, 60-5, 67-1, 67-2, 67-3, 68-2, 73-1, 73-2, 74-1, 74-2, 78-1, 78-2, 78-3, 79-1, 79-2, 80, 81, Capleville, Collierville, Forest Hills, Germantown and Ross' Store."
>
> "(7) The seventh congressional district is composed of the counties of Benton, Carroll, Crockett, Dyer, Dibson, Haywood, Henry Lake, Lauderdale, Madison, Obion, Stewart, Tipton, Weakley and the following voting wards, precincts and districts of the City of Memphis and Shelby County: 68-1, 69-1, 69-2, 70-1, 70-2, 71-1, 71-2, 72-2, 72-3, Arlington, Bartlett, Brunswick, Cordova, Eads, Ellendale, Kerrville, Locke, Lucy, McConnell's Millington, Morning Sun, Mullins, Raleigh I, Raleigh II, Raleigh III, Scenic Hills, Stewartville and Woodstock."
>
> "(8) The eighth congressional district is composed of all the remaining voting wards, precincts, and districts of the City of Memphis and Shelby County not established as a portion of the sixth and seventh congressional districts as set out above."

STATEMENT OF THE CASE

This action was instituted on July 2, 1974 in the United States District Court for the Western District of Tennessee, Western Division by Roscoe Dixon and other individual plaintiffs who were registered voters in the sixth, seventh and eighth congressional districts of Tennessee. These plaintiffs, now appellees, sought declaratory and injunctive relief based upon their allegations that the sixth, seventh and eighth congressional districts of Tennessee were unconstitutionally malapportioned. T.C.A. § 2-1603 was enacted by the Tennessee General Assembly in 1972 to provide reapportionment of Tennessee's congressional districts based upon the 1970 decennial census.

The United States District Court denied appellees' application for a preliminary injunction prior to the primary election to be conducted on August 1, 1974 in view of the short length of time until that election.

At a hearing conducted on September 24, 1974, the parties stipulated that the population of the sixth, seventh and eighth congressional districts, according to the 1970 United States Census, as interpolated by the Memphis and Shelby County Planning Commission, was 473,060, 487,583 and 510,031, respectively. The parties further stipulated that the optimum population per congressional district was 490,615.

On December 26, 1974, the District Court held that based upon the 1970 United States Census figures, the sixth and eighth congressional districts of Tennessee were malapportioned. The District Court deferred any action upon its finding of malapportionment noting that the Tennessee General Assembly was due to convene in January, 1975 and that the legislature would have the opportunity to correct the malapportionment. The Tennessee General Assembly did consider reapportionment at its 1975 session, but the bill providing for the reapportionment of the sixth, seventh and eighth congressional districts was not enacted.

Appellant intervened in this cause on October 22, 1975 and urged the District Court to consider Bureau of the Census estimates of population in the sixth, seventh and eighth congressional districts as of July 1, 1974. The parties agreed that proof of the validity of these population estimates and proof against the validity of the evidence would be taken by deposition. Appellant presented the deposition of Peter K. Francese of the National Planning Data Corporation in support of the population estimates and appellees presented the deposition of Donald E. Pursell, a labor economist and demographer at Memphis State University, in opposition to the validity of the population estimates.

On March 25, 1976 the majority opinion of the District Court, written by Chief District Judge Bailey Brown, found that the District Court was not bound, as a matter of law, to the 1970 census figures in reapportioning the congressional districts in question. (J.S. A-10). The majority opinion further held that although population estimate might be used for reapportionment, the decennial census figures are controlling unless there is "clear, cogent and convincing evidence" that the census figures are invalid and that other figures are valid. (J.S. A-10, A-11). After summarizing the testimony of appellant's expert witness, Mr. Peter K. Francese, the majority opinion concluded that appellant had not presented ". . . clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current population . . ." of the sixth, seventh and eighth congressional district. (J.S. A-13). The District Court held that the sixth and eighth congressional districts should be reapportioned by adding 17,201 persons to the sixth and subtracting a like number from the eighth.

Chief Circuit Judge Harry Phillips concurred in the results of the majority opinion but would have held that the District Court was bound, as a matter of law, by the 1970 census figures. (J.S. A-18—A-19). District Judge Harry W. Wellford dissented stating that the Bureau of the Census figures were sufficiently valid and should have been considered by the Court. (J.S. A-20—A-28).

ARGUMENT

Pursuant to Rule 16(c) and (d) of this Court, the Coordinator of Elections and Shelby County Election Commissioners move to dismiss the appeal on the ground that the questions on which the decision of this cause depends are so insubstantial as not to need further argument, or, in the alternative, to affirm the decision of the District Court on the ground that the questions presented challenge the District Court's factual findings and conclusions which have not been shown to be "clearly erroneous."

I

The Questions on Which the Decision of This Cause Depends Are So Insubstantial as Not to Need Further Argument.

The Coordinator of Elections and the Shelby County Election Commissioners are aware of no case in which a *court* has drawn congressional district boundaries using population figures of a source other than a decennial federal census. Appellants cite *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb., 1968), *Meeks v. Avery*, 251 F. Supp. 245 (E.D. Kan., 1966) and *Gong v. Kirk*, 278 F. Supp. 133 (S.D. Fla., 1967) aff'd. 389 U.S. 574 (1968) as cases in which the courts, either by approval or by the action of the Court itself, have used data other than the decennial federal census in fashioning a reapportionment of congressional districts. These appellees respectfully submit that these authorities do not support appellant's contention that population estimates, rather than figures from the 1970 decennial census, should have been used by the District Court in the case at bar.

In *Exon v. Tiemann, supra.*, the Court approved a *state-wide* redistricting plan which had been passed by the Nebraska legislature, and bolstered its approbation by citing not only 1960 federal census figures, but also a 1966 University of Nebraska

estimate, and a 1967 Legislative Research Bureau projection. In *Meeks v. Avery, supra.*, the court approved a legislative redistricting bill which utilized a state enumeration required by state law where ". . . its accuracy was not questioned." 251 F. Supp. 245, 249. The difference between an ideal district according to the state census of 1964 and the federal census of 1960 was only 385 persons. The Court upheld the action of the Kansas legislature as it had made an honest and good faith effort to construct congressional districts as nearly of equal population as is practicable. Citing *Reynolds v. Sims*, 377 U.S. 533 (1964). Cf. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). In neither of the above cases did the courts determine for the first time a matter of redistricting not founded upon a decennial census.

Appellant's reliance upon *Gong v. Kirk, supra.* is also misplaced since the basis of the Court's redistricting plan in *Gong* was the 1960 decennial census. In discussing the population figures to be utilized, the Court noted:

> "The federal decennial census meets the minimal requirements of the equal protection clause, and no other census or population computation has been shown to be accurate." 278 F. Supp. 133, 134.

The District Court's reapportionment plan in *Gong* utilized a ratio formula which was *based* upon the 1960 decennial census.

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population *as shown by the 1960 decennial census;* i.e., county registration is to county population as precinct registration is to precinct population. This formular was suggested by both plaintiffs and defendants." 278 F. Supp. 133, 135 (Emphasis added).

As opposed to the utilization of "population estimates" for reapportionment, courts have consistently recognized the correctness of decennial federal census data and have judicially noted such data. In *Skolnick v. Board of Commissioners of Cook County*, 435 F.2d 361 (7th Cir. 1970), a complaint filed in 1966 alleged a violation of the one man-one vote principle according to the 1960 federal census figures. At the time of the appeal, the 1970 decennial census figures were available. Judicially noting those figures, the appellate court held that the plaintiffs-appellants had no standing as the more recent figures demonstrated that they were over-represented. The court noted that other federal courts had frequently judicially noticed federal census data, citing *Granville-Smith v. Granville Smith*, 349 U.S. 1 (1955); *Grills v. Branigan*, 284 F. Supp. 176 (S.D. Ind. 1968), aff'd sub nom *Branigin v. Duddleston*, 391 U.S. 368 (1967); *Baker v. Clement*, 247 F. Supp. 886 (M.D. Tenn. 1965); *Daniel v. Davis*, 220 F. Supp. 601 (E.D. La. 1963).

In *Grills v. Branigin, supra.* the Federal District Court in 1968 redistricted the State of Indiana on the judicially noted 1960 federal census although "the communities of the state have grown disproportionately in population." 284 F. Supp. 176, 180. The Court noted that the number of congressmen apportioned to Indiana was based upon the 1960 census and not upon any other governmental or private census and that that number could not be changed until the next federal census. It stated that the 1960 federal census was to be "tolerated until the next official census in order to maintain relative political stability." Id.

The Seventh Circuit has stated unequivocally that a physical head count has been shown to be the most reliable method

which can be used. *Skolnick v. Mayor*, 415 F.2d 1291, 1299 (7th Cir. 1969). In 1967 Tennessee was redistricted utilizing 1960 federal census figures. Apparently the court judicially noted these figures. *Baker v. Ellington*, 273 F. Supp. 174 (M.D. Tenn. 1967).

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), this Court, in holding that equal representation required states to make a good-faith effort to achieve precise mathematical equality in congressional districts, commented that the best population data available to the Missouri legislature in 1967 was the 1960 United States census figures. 394 U.S. 526, 528. The Court also stated:

> "We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be *thoroughly documented* and applied *throughout the State* in a systematic, not an *ad hoc*, manner." 394 U.S. 526, 535 (Emphasis added).

These appellees respectfully assert that this Court in *Kirkpatrick, supra*, has adequately addressed the questions which appellant seeks here to raise. *Kirkpatrick, supra*, it is submitted, recognized that decennial federal census figures are normally the best guide for congressional redistricting plans. Appellees respectfully submit that the District Court was correct in requiring "clear, cogent and convincing" evidence that other population figures were more accurate than the decennial census figures. Likewise, the District Court was correct in holding that *Kirkpatrick, supra*, would only allow application of popula-

tion estimates on a statewide basis and would not permit the application of population estimates to three (3) of Tennessee's eight (8) congressional districts. Logic would dictate that if Representatives are to be apportioned equally within a state, the same population figures must be utilized in the apportionment. As previously noted, the 1970 decennial census was utilized in constituting the five (5) other congressional districts in Tennessee under T.C.A. § 2-1603, and the District Court correctly utilized those figures to reapportion the sixth and eighth congressional districts.

II

The Questions Presented Challenge the District Court's Factual Findings and Conclusions Which Have Not Been Shown to Be "Clearly Erroneous."

As noted above, the basis of the District Court's ruling that it would not consider the population estimates submitted by appellant was because appellant had not presented ". . . clear, cogent and convincing proof that the 1970 Federal census figures are not the best evidence of the current population . . ." of the sixth, seventh and eighth congressional districts. (J.S. A-13). This determination is, of course, a factual conclusion of the District Court based upon the evidence presented in that Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

This Court has held that, "[t]he findings and conclusions of the District Court are, of course, governed by the 'clearly erro-

neous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corporation*, 415 U.S. 486, 508 (1974).

The Coordinator of Elections and Shelby County Election Commissioners respectfully submit that appellant has not shown the findings of the District Court to be "clearly erroneous."

CONCLUSION

Based on the foregoing it is respectfully submitted that this appeal should be dismissed, or the decision of the District Court affirmed, because the questions presented do not raise a substantial question and the questions presented challenge the District Court's factual findings which have not been shown to be clearly erroneous.

Respectfully submitted,

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